(1)

Supreme Court, U.S.
FILED

00 970 DEC 11 2000

No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

TOMAS LORENZO PEREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

FRANCISCO CASTRO AMY
P.O. BOX 9023222
SAN JUAN, PR 00902-3222
(787) 723-3672

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

82 pp

QUESTION PRESENTED

Whether appeals court ruling that convictions under 18 U.S.C. § 924(c) did not require jury to determine beyond a reasonable doubt that defendant knew he was using a weapon that had been converted to a fully automatic weapon so as to expose him to a 30 year term of imprisonment constitutes reversible error in light of this Court's recent opinions in *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000); *U.S. v. Castillo*, 120 S. Ct. 2090 (2000) and *Staples v. U.S.*, 511 U.S. 600 (1994).

TABLE OF CONTENTS

Page

Question Presented i

Opinion Below 1

Jurisdiction 1-2

Statutes Involved in this Case 2-3

Statement of the Case 3-6

Reasons for Granting the Writ 6-10

1. The First Circuit's Opinion directly conflicts with this Court's Opinions in *U.S. v. Castillo*, 120 S. Ct. 2090 (2000), *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000) and *Staples v. U.S.*, 511 U.S. 600 (1994) and involves an important issue concerning the application of the aggravated penalties established in 18 U.S.C. § 924(c)(1)(B)(i) and (ii) which has yet to be decided by this Hon. Court and warrants granting the writ of certiorari presented 6-10

Conclusion 10

Appendix

(a) Opinion, First Circuit Court ..... App. 1-37

(b) Judgment ..... App. 38-46

(c) Notice of Appeal ..... App. 47

(d) Indictment ..... App. 48-56

(e) Judgment on Appeal ..... App. 57

(f) Order denying rehearing ..... App. 58-59

(g) Transcript, Government's Expert Witness ..... App. 60-68

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey, 120 S. Ct. 2348 (2000).... 6, 7, 9

Staples v. U.S., 511 U.S. 600 (1994) 6, 8

U.S. v. Brantley, 68 F.3d 1283 (11th Cir. 1995).....6, 9

U.S. v. Castillo, 120 S. Ct. 2090 (2000) 6, 7, 9

U.S. v. Shea, 150 F.3d 44 (1st Cir. 1998).....6, 9

STATUTES AND RULES

18 U.S.C. § 924(c)(1) ..... *passim*

18 U.S.C. § 924(c)(1)(B)(ii) 4

18 U.S.C. § 924(c)(2)(B)(1)..... 4

18 U.S.C. § 1203(a)(b), 2 3

26 U.S.C. § 5861..... 8

PETITION OF WRIT OF CERTIORARI

Tomas Lorenzo-Perez respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals of the First Circuit entered in this proceeding on September 1, 2000, which is contrary to and conflicts with prior decisions of this Hon. Court.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit that gives rise to this petition is reprinted in Appendix at pp. 1-37. By order filed September 19, 2000, the First Circuit denied the Petition for Rehearing and Suggestion for Rehearing en Banc. App. pp. 58-59.

JURISDICTION

Petitioner was sentenced on January 5, 1999 (App. pp. 38-46). A timely Notice of Appeal, was filed on January 12, 1999 (App. p. 47), to the First Circuit Court of Appeals, which affirmed in part and reversed in part in an opinion, was filed on September 1, 2000. The First Circuit denied Petitioner's timely filed Motion for Rehearing and Suggestion for Rehearing en Banc on September 19, 2000. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within 90 days of the denial of the rehearing.

The jurisdiction of the Court involved pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

18 U.S.C. § 924(c)(1) provides:

"(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection –

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the

person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years."

STATEMENT OF THE CASE

Lorenzo-Perez was convicted by a jury for having conspired with the other co-defendants to seize and detain Richardson Mieses Pimentel in order to compel other persons to pay ransom as a condition of his release (Count One); for aiding and abetting to seize, detain and threaten to kill Mieses Pimentel to compel others to pay ransom as a condition of his release (Count Two), in violation of Title 18 U.S.C. § 1203(a)(b) and 2.

He was also charged with two firearms counts, for using and carrying firearms during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1) (Count Three) and using and carrying during and in relation to a crime of violence a fully automatic 9 mm Uzi pistol, a revolver and a Smith and Wesson revolver all in violation of Title 18 U.S.C. § 924(c)(1). (Count Five) (App. pp. 48-56).

Lorenzo-Perez was sentenced to a term of imprisonment of 135 months in Counts One and Two to be served concurrently, 60 months as to Count Three and 360 months as to Count Five, said terms to be served consecutively with Count one and two. (App. pp. 38-46).

Lorenzo-Perez appealed the conviction to the First Circuit Court of Appeals which rendered an opinion affirming in part the conviction but reversing the consecutive firearms sentence imposed in Count Three and Five making them concurrent one with the other. (App. p. 37).

Lorenzo-Perez had attacked the sufficiency of the evidence to sustain his conviction in Count 5, the machine gun, 18 U.S.C. § 924(c)(1) violation, arguing that the record was devoid of any evidence from which a jury could conclude beyond a reasonable doubt that he had knowledge that the Uzi pistol, which was a semi-automatic weapon as manufactured, had been converted to a fully automatic weapon, thereby precluding the imposition of the 30 year term of imprisonment established in 18 U.S.C. § 924(c)(1)(B)(ii).

The uncontroverted trial evidence, as established by government's expert firearms witness Steven Casper, demonstrated that the Uzi pistol was manufactured to fire in the semi automatic mode.[1] At the time of the kidnapping it could not fire any bullets at all due to the extremely gummed up condition in which it was and because of a dent that was in the upper receiver which prevented the pistol from being fired. The expert had to use a punch and hammer to correct the indentation and clean the pistol to make it operable in the fully automatic mode to which it had been altered. According to the expert he had determined that the firearm had been

---

[1] Had Lorenzo-Perez been convicted of use and carriage of a semi automatic weapon he would have only been subjected to a 10 year term of imprisonment. 18 U.S.C. § 924(c)(2)(B)(i).

inoperable for months or years due to the condition it was found at the time it was received when Mieses Pimentel was rescued. (App. 60-68)

Since the trial evidence was devoid of any evidence of who owned the Uzi, and from the testimony of the firearms expert, it was patently clear that during the time period of the kidnapping from August 15 until August 25, 1997, said Uzi was inoperable and had been for months or years, the evidence was insufficient to impose the substantially higher 30 year term of imprisonment for carriage of a "machine gun" since there was no evidence in the record from which a reasonable jury could conclude that Lorenzo-Perez had knowledge that the Uzi pistol had been altered from being a semi-automatic weapon to a fully automatic weapon.

Since the trial judge in his instructions to the jury never submitted a special verdict form for the jury to determine which firearms of the three alleged in Count Five Lorenzo-Perez should be accountable for,[2] nor did he define to the jury what was a "machine gun" nor a "semi automatic weapon" pursuant to law, the jury never determined if the evidence was sufficient beyond a reasonable doubt to hold Lorenzo-Perez liable for the converted Uzi pistol as a machine gun and the evidence was otherwise insufficient for the jury to conclude that he knowingly utilized or possessed such a firearm in the commission of the crime of violence underlying the firearm count.

---

[2] The other two revolvers mentioned in Count Five would have only subjected Lorenzo-Perez to a 5 year term of imprisonment.

The appeals Court, citing *U.S. v. Shea*, 150 F.3d 44, 51-52 (1st Cir. 1998) which in turn relied on *U.S. v. Brantley*, 68 F.3d 1283 (11th Cir. 1995), ruled that in an 18 U.S.C. § 924(c)(1) violation it is not necessary for the government to prove that the defendant had knowledge the firearm he possessed was the type of firearm that exposed him to the aggravated penalties established in 18 U.S.C. § 924(c)(1)(B)(i) or (ii).

REASONS FOR GRANTING THE WRIT

The First Circuit's Opinion directly conflicts with this Court's Opinions in *U.S. v. Castillo*, 120 S. Ct. 2090 (2000), *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000) and *Staples v. U.S.*, 511 U.S. 600 (1994) and involves an important issue concerning the application of the aggravated penalties established in 18 U.S.C. § 924(c)(1)(B)(i) and (ii) which has yet to be decided by this Hon. Court and warrants granting the writ of certiorari presented.

In *U.S. v. Castillo*, 120 S. Ct. 2090 (2000), this Hon. Court held that the enhanced penalties established in U.S.C. § 924(c)(1) for use of a "machine gun" or other enhanced weapons constitute separate aggravated substantive crimes and not merely sentencing enhancements, which require the jury to make a specific finding beyond a reasonable doubt that such an enhanced weapon was utilized by the defendant in the commission of the underlying crime supporting the 924(c)(1) violation.

In *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), this Hon. Court went on to hold that any fact that increases

the statutory maximum penalty must be submitted to the jury and proven beyond a reasonable doubt.

Under 18 U.S.C. § 924(c)(1), different statutory penalties apply depending on the type of firearm which the defendant utilized at the time he committed the underlying crime of violence. If it is an ordinary revolver, the statutory penalty is 5 years; if it is a semi-automatic weapon, the penalty is 10 years; and if the weapon is a machine gun or is equipped with a silencer the maximum penalty increases substantially to 30 years.

Under these circumstances there is no doubt that pursuant to this Hon. Court's opinions in *Castillo* and *Apprendi* such an aggravating fact must be submitted to the jury and proven beyond a reasonable doubt for the convictions to be upheld.

The issue then arises whether or not the government as part of its evidence must adduce sufficient evidence from which a rational jury could infer beyond a reasonable doubt that the defendant knew or was cognizant that he was in fact using a "machine gun" which would expose him to the higher aggravated penalty for which he has been charged. In the vast majority of cases this would not be difficult since the use of a firearm manufactured as a fully automatic weapon, would establish the necessary factual predicate for the jury to conclude that the defendant knew he was using such a firearm.

However, where as here, the firearm was manufactured as a semiautomatic weapon and later converted by an unidentified person to operate in a fully automatic

mode and at the time of the commission of the underlining offense such a firearm was inoperable and the evidence showed that it was inoperable for months or years prior to its usage, the government must come forward with additional evidence such as ownership or some fact that could lead a jury to conclude that a user was aware of the alteration of the firearm which would justify making him criminally liable for the substantially higher aggravated 30 year penalty established in 18 U.S.C. § 924(c)(1) for usage of a machine gun, instead of the 10 year penalty for usage of a semi automatic weapon.

This Court's opinion in *Staples v. U.S.*, 511 U.S. 600, 616 (1994) supports such reasoning. There the Court looked at the harsh penalty of 10 years incarceration established for a violation of the National Firearms Act 26 U.S.C. § 5861 (d) to conclude that "Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as disposing with 'mens rea'."

Certainly if this Court found that the imposition of a 10 year penalty warranted imposing as an element of the offense knowledge of the characteristics of the firearm that brought it within the statutory definition of a machine gun, it necessarily follows that such reasoning applies in the case of a 924(c)(1) violation involving a "machine gun" which mandates a fixed statutory penalty of 30 years.

The First Circuit's opinion in this case holding that in 18 U.S.C. § 924(c)(1) violations it is not necessary for the government to prove beyond a reasonable doubt that the defendant had knowledge of the type of firearm charged

to justify an aggravated penalty, relying on *U.S. v. Shea*, 150 F.3d 44 (1st Cir. 1998) which in turn was based on the reasoning of *U.S. v. Brantley*, 68 F.3d 1283 (11th Cir. 1995) is erroneous because said cases parted from the premise that the enhanced penalties found in 18 U.S.C. § 924(c)(1) constituted "sentencing enhancements" which made it unnecessary for the government to prove such knowledge at trial since what was determinative was usage of a "firearm" in the commission of the underlying offense giving rise to the 924(c)(1) violation. Such reasoning was rejected by this Court in *Castillo* and *Apprendi*, supra, and as a result cannot continue to justify such a conclusion.

The error in this particular case constitutes "plain error" because the trial evidence showed that the firearm as manufactured was not a machine gun, that during the commission of the underlying offense the firearm was inoperable, and that it had been inoperable for months or years prior to the kidnapping, thereby making it impossible for the jury to infer that Lorenzo-Perez knew he was using a semi automatic weapon that had been converted to fully automatic.

Since the government's evidence never established who owned the Uzi, the record is devoid of any evidence concerning the essential fact that would make him criminally responsible for usage of a machine gun during a crime of violence. That is, there is no evidence from which the jury could infer that he knew that the Uzi had been converted to fire in the fully automatic mode. Under these circumstances the imposition of a 30 year term of imprisonment in Count 5, shocks the conscience and

seriously affects the integrity or public reputation of the judicial proceedings, which justifies finding plain error.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

RAFAEL F. CASTRO LANG
USDC-PR-128505
Attorney for Petitioner
P.O. Box 9023222
San Juan, P. R. 00902-3222
(787) 723-3672; 723-1809
(787) 725-4133 Fax

United States Court of Appeals
For the First Circuit

No. 99-1024

UNITED STATES OF AMERICA,

Plaintiff, Appellee,

v.

LUIS MANUEL PEÑA-LORA,

Defendant, Appellant,

No. 99-1236

UNITED STATES OF AMERICA,

Plaintiff, Appellee,

v.

JORGE LORENZO-HERNÁNDEZ,

Defendant, Appellant,

No. 99-1237

UNITED STATES OF AMERICA,

Plaintiff, Appellee,

v.

THOMAS LORENZO-PÉREZ

Defendant, Appellant,

No. 99-1238

UNITED STATES OF AMERICA,

Plaintiff, Appellee,

v.

LORENZO PEÑA-MORFE,

Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO
[Hon. Salvador E. Casellas, *U.S. District Judge*]

Before
Selya, *Circuit Judge*,
Cyr, *Senior Circuit Judge*,
and Stahl, *Circuit Judge*.

Rafael F. Castro-Lang, with whom *Graham A. Castillo* and *Luz M. Rios-Rosario* were on brief for appellant Lorenzo-Pérez.

Luz M. Ríos-Rosario, with whom *Rafael F. Castro-Lang* and *Graham A. Castillo* were on brief for appellant Peña-Morfe.

Graham A. Castillo, with whom *Rafael F. Castro-Lang* and *Luz M. Ríos-Rosario* were on brief for appellant Peña-Lora.

Michael J. Cruz for appellant Lorenzo-Hernández.

Michelle Morales, Assistant United States Attorney, with whom *Guillermo Gil*, United States Attorney, and

Jorge E. Vega-Pacheco, Assistant United States Attorney, were on brief for appellee.

September 1, 2000

CYR, Senior Circuit Judge. Appellants challenge the convictions and sentences imposed for their respective roles in an armed hostage-taking which took place in the District of Puerto Rico in 1997. For the most part, *but see infra* Sections II.A.2.b & II.D, their appeals fail.

I

BACKGROUND

On August 17, 1997, appellant Peña-Morfe and a person called "Charlie" abducted Richardson Leo Mieses-Pimentel at gunpoint as he was leaving the Chris Café, a place of business owned by his family. The abductors placed a hood over the victim's head, handcuffed him, and transported him to a private residence, where he was interrogated regarding his family's financial resources, then informed that his abductors intended to demand a $500,000 ransom from the family. Throughout the ensuing ten-day captivity, Mieses-Pimentel was continually blindfolded, forcibly restrained (*i.e.*, handcuffed in a bathtub or chained to a bed), and repeatedly threatened with death. Following three days of captivity at the initial site, during which the captors unsuccessfully phoned Mieses-Pimentel's family to negotiate a ransom, another accomplice – Santiago Acosta-Molina – was recruited and

Mieses-Pimentel was relocated at nighttime to the Acosta-Molina residence.

During the ensuing captivity, Acosta-Molina observed Peña-Morfe, Lorenzo-Pérez and Peña-Lora toting various weapons, including revolvers, while placing phone calls to Mieses-Pimentel's family. At one point, Lorenzo-Pérez threatened the newly recruited accomplice, Acosta-Molina, with an UZI submachine gun, which he referred to as "The Silencer" used "for the people who talk." Throughout this period of captivity, the three defendants repeatedly assaulted Acosta-Molina with blows to the face and chest.

Three days later, at Acosta-Molina's insistence, the original captors relocated Mieses-Pimentel to a residence in Barrio Obrero, informing him that he was being taken to the place where he would be killed. Upon arrival at this third residence, Mieses-Pimentel was handcuffed, blindfolded, and chained to a bed in a rear bedroom.

At about the same time, an INS agent recognized Peña-Morfe's voice from an FBI tape of a ransom call to the victim's family. After arranging a meeting with Peña-Morfe, the INS agent placed him under arrest. Peña-Morfe admitted his participation in the abduction and led the FBI to the third residence, where Mieses-Pimentel was being held hostage.

An FBI SWAT team surrounded the residence, demanding that its occupants surrender. At this point in time – having been relieved of the blindfold and handcuffs by his captors – Mieses-Pimentel saw someone running toward the rear of the residence carrying firearms (including a machinegun). Then he was escorted to a

different room at the rear of the residence, where he remained in the custody of appellant Lorenzo-Hernández, Raimary Lavandier (who was carrying a baby), and a male youth whose identity was not disclosed at trial.

Ultimately, Raimary Lavandier and the unidentified male youth abandoned Mieses-Pimentel, exited the residence, and submitted to arrest by the FBI. A subsequent search disclosed two revolvers and an UZI machinegun secreted in the backyard of the residence.

The four appellants, as well as Acosta-Molina and Lavandier, were indicted for conspiring to commit a hostage-taking for ransom (Count 1), *see* 18 U.S.C. § 1203 (a), and for aiding and abetting the hostage-taking (Count 2), *see id.* & § 2.[1] Peña-Morfe and Lorenzo-Pérez jointly were charged with using or carrying firearms during and in relation to a crime of violence (*viz.*, the hostage-taking)

---

[1] The statute provides:

> [W]hoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts or conspires to do so, shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.

18 U.S.C. § 1203(a).

(Count 3). *See* 18 U.S.C. § 924(c)(1).[2] Finally, Peña-Morfe, Lorenzo-Hernández, and Lorenzo-Pérez were jointly charged, in Count 4, with using or carrying three weapons: two .357 revolvers and an Israeli semiautomatic 9 mm UZI. *See id.* § 924(c)(1) & (2). Pursuant to a plea agreement with the government, Acosta-Molina was required to testify against appellants at trial.

A superseding indictment modified the firearm counts as follows: Count 4 charged Peña-Lora with using or carrying a firearm; Count 5 charged Lorenzo-Hernández and Lorenzo-Pérez with using or carrying firearms, "specifically a fully-automatic 9 millimeter UZI, serial number UP00514, as defined in 18 U.S.C., Section 921(a)(23) and 26 U.S.C., Section 845(b), a Ruger .357 revolver, serial number 153191995, and a Smith & Wesson

---

[2] The statute provides, in pertinent part:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime . . . be sentenced to a term of imprisonment of not less than 5 years. . . . If the firearm possessed by a person convicted of a violation of this subsection . . . is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

18 U.S.C. § 924(c).

.357 revolver, serial number 90922c-19"; Count 6 charged Raimary Lavandier with failing to report and/or concealing a federal crime. *See* 18 U.S.C. § 4.

After Acosta-Molina and Mieses-Pimentel testified for the government at trial, guilty verdicts were returned against each defendant on every count charged in the superseding indictment. Following sentencing, Peña-Morfe, Lorenzo-Pérez, Lorenzo-Hernández, and Peña-Lora filed timely notices of appeal from their respective convictions and sentences.

II

DISCUSSION

A. Sufficiency of the Evidence

Appellants claim the government failed to present sufficient evidence to establish either the hostage-taking or firearms counts. *See* Fed. R. Crim. P. 29; *supra* notes 1 & 2. We must affirm the jury verdicts unless the evidence and all reasonable inferences, viewed in the light most favorable to the government's case, would not enable a rational jury to find each element of the charged offenses beyond a reasonable doubt, *see United States* v. *Hughes*, 211 F.3d 676, 681 (1st Cir. 2000), even though the prosecution may not have " 'present[ed] evidence that preclude[d] every reasonable hypothesis inconsistent with guilt.' " *Id.* (citation omitted).

1. Peña-Morfe, Lorenzo-Pérez and Peña-Lora

Peña-Morfe, Lorenzo-Pérez and Peña-Lora acknowledge that cooperating defendant Acosta-Molina presented graphic eyewitness testimony unambiguously identifying and implicating each of them in the hostage-taking. Moreover, Acosta-Molina unambiguously linked each to the use or carrying of the various firearms. Accordingly, these three defendants are limited to the familiar appellate refrain that their trial jury rationally could not have credited the testimony given by Acosta-Molina since he had every incentive to prevaricate in order to gain favorable treatment from the government because he is a confessed hostage-taker himself.

With rare exceptions, it is the jury – rather than an appellate court – which must assess witness credibility. *See United States* v. *Cruz*, 156 F.3d 22, 27 (1st Cir. 1998), *cert. denied*, 526 U.S. 1124, 119 S. Ct. 1781, 143 L.Ed.2d 809 (1999). " '[A] conviction based solely upon the uncorroborated testimony of an accomplice can be upheld, as long as the jury is properly instructed and the testimony is not incredible as a matter of law.' " *United States* v. *LiCausi*, 167 F.3d 36, 47 (1st Cir.) (citation omitted), *cert. denied*, 120 S. Ct. 79 (1999).

Additionally, Acosta-Molina was subjected to vigorous cross-examination and the government acknowledged in its closing argument that he was a confessed hostage-taker, thus emphasizing that the jury must carefully weigh his credibility. *See id.* ("[A]n accomplice is qualified to testify as long as any agreements he has made with the government are presented to the jury and

the judge gave complete and correct instructions detailing the special care the jury should take in assessing the testimony.") (internal quotation marks and citations omitted).[3]

Moreover, the government also adduced independent evidence corroborating the Acosta-Molina testimony. For instance, an INS agent recognized Peña-Morfe's voice from the tapes made of the ransom calls, which were played for the jury at trial. *See United States* v. *Flores-Rivera*, 56 F.3d 319, 324 (1st Cir. 1995). The agent also took Peña-Morfe's post-arrest confession, after which Peña-Morfe led the FBI to the residence where Mieses-Pimentel was being held. On another tape, an abductor was referred to as "Luis" – the first name of defendant Peña-Lora. Similarly, Mieses-Pimentel testified that he overheard one of his captors become extremely upset when a cohort inadvertently referred to him as "Luis," rather than by his alias.

Accordingly, the sufficiency challenges relating to the hostage-taking and firearms counts against these three appellants fail.

---

[3] The district court correctly instructed the jury that Acosta-Molina was "providing evidence under a plea and cooperation agreement with the government . . . [and][w]hile some people in this position are entirely truthful when testifying, you should consider the testimony of these persons with particular caution."

2. Lorenzo-Hernández

The sufficiency challenges asserted by Lorenzo-Hernández are more problematic for the government.[4] Although he concedes that the government established that he was in the house on the morning the FBI rescued Mieses-Pimentel, he maintains that his actions proved nothing more than "mere presence" at the scene of the crime, rather than knowing participation in the abduction. *See, e.g., United States* v. *Cruz-Paulino*, 61 F.3d 986, 1001 (1st Cir. 1995) (noting that "mere presence" at crime scene normally is insufficient to establish knowing participation in offense). Accordingly, Lorenzo-Hernández contends that the jury rationally could not have inferred from the available evidence that he had the requisite specific intent to commit either the hostage-taking or the firearm offenses. *See id.*

A close review of the entire trial record discloses: (a) ample evidence that Lorenzo-Hernández intended to participate in the hostage-taking; and (b) insufficient evidence for the firearm conviction under Count 5.

---

[4] Although Acosta-Molina actually participated in the hostage-taking with the three other appellants, he did not implicate Lorenzo-Hernández, whom he did not meet until after his arrest. In rejecting Lorenzo-Hernández's motion for judgment of acquittal, the district court downplayed this fact, however, because Lorenzo-Hernández's alleged role in the conspiracy did not commence until *after* Mieses-Pimentel had been relocated from the Acosta-Molina residence. Nonetheless, it is significant that Acosta-Molina testified that he had visited the third residence after Mieses-Pimentel was taken there. Acosta-Molina testified that he met Peña-Morfe and others there, but made no mention of Lorenzo-Hernández.

a. The Evidence

The entire case against Lorenzo-Hernández rests on Mieses-Pimentel's eyewitness testimony concerning the events on the final morning of his captivity, after the FBI had surrounded the third residence at which he had been held hostage. Accordingly, we scrutinize the trial testimony provided by Mieses-Pimentel.

Government counsel asked Mieses-Pimentel who had been present during his three-day captivity at the third residence. Mieses-Pimentel responded that he had heard the voices of a female, a baby, and "two male[s]." During that time, Mieses-Pimentel was continuously blindfolded and chained to a bed in the rear of the house. These same "two male[s]" – though not the female – had come into the bedroom on a regular basis throughout his captivity, to bring food and escort him to the bathroom.

On the morning the FBI surrounded the house and called for its occupants to surrender, one of these two males (we shall refer to him as "Male A") hurriedly entered the rear bedroom, told Mieses-Pimentel to be silent, removed his blindfold and handcuffs, then relocated him to another room at the rear of the house.

At trial, Mieses-Pimentel perfunctorily described Male A as "a younger guy with a dark complexion." Government counsel then asked Mieses-Pimentel: "What else did [you] see?" – presumably, when Mieses-Pimentel reached the other room at the rear of the residence. To which Mieses-Pimentel responded: "*the other person*, he was a young guy" (Male B?), the female, and the baby. Government counsel then asked Mieses-Pimentel whether he could identify "any of these people in the

courtroom today." Whereupon Mieses-Pimentel pointed out Raimary Lavandier and "the person sitting next to her," whom government counsel identified as Lorenzo-Hernández.

The ensuing testimony from Mieses-Pimentel exhibits a glaring inconsistency, however. When asked what "the other individual that you have identified sitting next to [Raimary Lavandier]" – *viz.*, in the courtroom, *i.e.*, Lorenzo-Hernández – had done once Mieses-Pimentel had been relieved of the blindfold and handcuffs, Mieses-Pimentel replied: "He was the one that took me to the back room and told me to sit down and to act like I was one of them."

At first blush, the quoted testimony suggests that Lorenzo-Hernández was Male A, identified earlier by Mieses-Pimentel, *see supra*, as the only individual who had entered the rear bedroom after the FBI arrived. However, when government counsel asked Mieses-Pimentel whether the individual who had removed the blindfold was present in the courtroom, Mieses-Pimentel responded: "[n]o," notwithstanding the fact that he had testified earlier that a *single* individual – *i.e.*, Male A – had removed both his blindfold and the handcuffs, *then* escorted him from the rear bedroom to a different room in the rear of the residence.

Rather than resolving this testimonial discrepancy, however, government counsel asked Mieses-Pimentel to describe the scene he encountered upon arriving in the other room at the rear of the residence. Mieses-Pimentel responded that the four persons who were in the room

with him were "real nervous," and the "girl" (*viz.*, Lavandier) started to cry. "The other person *that is not here today* . . . got up and ran outside the room," followed shortly thereafter by the woman carrying the baby. (Emphasis added.) "The other person who *was* sitting next to her [*viz.*, in the rear room, *i.e.*, Lorenzo-Hernández] . . . ask[ed] [Mieses-Pimentel] not to move around too much in case the FBI came inside they would think he was looking for a gun and shoot us right there." Lorenzo-Hernández then "got up and ran outside and . . . left [Mieses-Pimentel] sitting there by [himself]."

When government counsel asked whether Mieses-Pimentel had seen any weapons "[a]fter the blindfold was removed[,]" he answered: "Yes, *before they took me in the room* [*i.e.*, the rear room to which he was relocated] I saw *the other person. He* was running towards the back of the house and carrying some weapons in his hands." (Emphasis added.) Mieses-Pimentel identified these weapons as "a small machine gun" and the two firearms used to abduct him from the Chris Café.

With respect to the sufficiency challenges to the Lorenzo-Hernández convictions on the hostage-taking counts, *see* 18 U.S.C. § 1203(a), the government touts three items of supportive evidence: the Mieses-Pimentel testimony that (1) Lorenzo-Hernández was one of the "males" who regularly brought him food in the rear bedroom during the three-day captivity at the third residence; (2) Mieses-Pimentel saw Lorenzo-Hernández running with the weapons toward the rear of the house on that morning, after the blindfold had been removed from Mieses-Pimentel; and (3) Lorenzo-Hernández was the person who had removed the blindfold and the handcuffs,

escorted him from the rear bedroom to the other rear room, and told him to act like one of them.

b. Count 5: Carrying Firearms

In relation to the Count 5 conviction for carrying firearms, *see* 18 U.S.C. § 924(c), the government relies on the trial testimony that Mieses-Pimentel saw Lorenzo-Hernández run with the weapons toward the rear of the house, whereas Lorenzo-Hernández claims that Mieses-Pimentel never identified "who that person was." As the record reflects that Lorenzo-Hernández failed to preserve this claim in the district court,[5] we review the present challenge to the sufficiency of the evidence only for plain error, *see United States* v. *Upham*, 168 F.3d 532, 537 (1st Cir. 1999) ("Sufficiency of the evidence objections are waived, if not made below. . . . "). Moreover, we will not reverse unless the conviction under Count 5 would result in a "clear and gross injustice." *United States* v. *Bello-Perez*, 977 F.2d 664, 668 (1st Cir. 1992); *see Upham*, 168 F.3d at 537 (noting that the *Olano* plain-error test envisions clear

---

[5] Lorenzo-Hernández's trial counsel advanced differing theories in the Rule 29 motion than in his closing argument. *See United States* v. *Dandy*, 998 F.2d 1344, 1356-57 (6th Cir. 1993) ("Although specificity of grounds is not required in a Rule 29 motion, where a Rule 29 motion is made on specific grounds, all grounds not specified are waived."). In fashioning his "mere presence" defense, counsel allowed that Mieses-Pimentel did identify his client as "the other person" running towards the rear of the house with the weapons, *see infra*, but contended that Mieses-Pimentel's testimony was not credible because, *inter alia*, no law enforcement officer had seen *anyone* leave the residence and conceal guns in the backyard.

showings that the evidence was obviously insufficient and seriously affected the defendant's substantial rights, as well as the fairness or integrity of the trial process) (citing *United States* v. *Olano*, 507 U.S. 725, 732-33 (1993)); *see also United States* v. *Todosijevic*, 161 F.3d 479, 482 (7th Cir. 1998) (" '[R]equirements for plain error are met with respect to sufficiency of the evidence claims 'if the record is devoid of evidence pointing to guilt, or if the evidence on a key element was so tenuous that a conviction would be shocking.' ") (citation omitted).

Notwithstanding the highly deferential standard of review, the conviction against Lorenzo-Hernández under Count 5 must be set aside. The case against Lorenzo-Hernández under Count 5 depended *entirely* upon the identification Mieses-Pimentel made of the person he saw carrying weapons shortly after law enforcement officers arrived on the premises. Contrary to the government's contention, Mieses-Pimentel did not identify Lorenzo-Hernández as the person whom he saw carrying firearms on that occasion.[6] Rather, on direct examination Mieses-Pimentel referred to the gun-carrier as "the other person," and on cross-examination simply as "someone."

---

[6] The government acknowledges that it adduced no evidence that Lorenzo-Hernández ever "used" these firearms. *See Bailey* v. *United States*, 516 U.S. 137, 143 (1995) ("using" element under § 924(c) contemplates proof that particular defendant "actively employed" weapon). Thus, it relied exclusively on the theory that Lorenzo-Hernández "carried" or transported the weapons on this occasion. *See United States* v. *Cleveland*, 106 F.3d 1056, 1066-67 (1st Cir. 1997) (*aff'd*, 524 U.S. 125 (1998) ("carrying" element of § 924(c) is satisfied by proof that defendant transported firearm either in a vehicle or on person).

We cannot reliably determine, within the context of the Mieses-Pimentel testimony, whether the term "the other person" adverted to Lorenzo-Hernández or to the second unidentified male youth who was in the house on the morning in question, but not in the courtroom during the trial testimony given by Mieses-Pimentel.[7] Since Mieses-Pimentel, in his immediately preceding testimony, twice used the phrase "other person," plainly referring to a different individual on each occasion, the following question – critical to the government's case – went unanswered: the person "[o]ther" than whom? We explain.

First, Mieses-Pimentel testified that "[t]he *other person* who is not here [in the courtroom] today" – *i.e.*, plainly someone *other than* Lorenzo-Hernández – "had been the first to run out of the rear room and surrender to the FBI. . . . " Second, he stated that "the *other person* who was sitting next to [the female and baby] . . . [who] ask[ed] him not to move around too much" was the last to leave the room, leaving Mieses-Pimentel by himself. Therefore, the latter person had to have been Lorenzo-Hernández, because only he could have been present both at the time of the FBI raid and during the trial testimony given by Mieses-Pimentel.

Consequently, we can discern no rational means by which the trial jury could have determined, beyond a reasonable doubt, *whether* the "other person," whom

---

[7] The record suggests, however, that the unidentified second male was an unindicted minor.

Mieses-Pimentel testified to having seen carrying the firearms toward the rear of the residence where Mieses-Pimentel was being held hostage, was Lorenzo-Hernández or the unidentified male minor.

The latent inconsistency in the Mieses-Pimentel testimony – as to whether one *or* two persons removed the blindfold and escorted him from the rear bedroom – undermines the jury verdict on Count 5 as well. If (as Mieses-Pimentel initially testified) Male A came into the rear bedroom, told Mieses-Pimentel to be quiet, took off the blindfold and handcuffs, *and* escorted Mieses-Pimentel to another room in the rear of the house, and if (as Mieses-Pimentel later testified) Lorenzo-Hernández was the person who escorted him from the rear bedroom to the other room in the rear of the residence, then it would appear highly implausible, if not physically impossible, that Lorenzo-Hernández was *also* the gun carrier described in the trial testimony given by Mieses-Pimentel. This is because Mieses-Pimentel saw the gun carrier just after his blindfold had been removed, but before Mieses-Pimentel was escorted to the other room in the rear of the residence.

Accordingly, the evidence strongly suggests that Male B – rather than Lorenzo-Hernández – was the "other person" whom Mieses-Pimentel observed carrying the weapons *while* Lorenzo-Hernández simultaneously relocated Mieses-Pimentel to another room in the rear of the residence. Moreover, the *government* invited these testimonial inconsistencies from Mieses-Pimentel, and absent any follow-up clarification by government counsel the jury plainly lacked a rational foundation for determining which version of these critical events was to be credited.

See United States v. *Morillo*, 158 F.3d 18, 22 (1st Cir. 1998) ("If the evidence viewed in the light most favorable to the verdict gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, [we] must reverse the conviction. This is so because . . . where an equal or nearly equal theory of guilt and a theory of innocence is supported by the evidence viewed in the light most favorable to the prosecution, a reasonable jury must necessarily entertain a reasonable doubt.") (internal quotation marks and citations omitted). Given the state of the trial record, therefore, the jury determination as to the identity of the gun carrier can only have been based on sheer speculation.

Although the trial participants assumed throughout that Mieses-Pimentel positively identified Lorenzo-Hernández as the gun-toter, the record is totally "devoid of evidence pointing to [Lorenzo-Hernández's] guilt [on Count 5]," and the government's " 'evidence on [that] key element was so tenuous that a conviction would be shocking.' " *Todosijevic*, 161 F.3d 479, 482 (citation omitted).[8] Nor can these deficiencies in the government's

---

[8] We note as well that customary appellate review and plain-error review of "sufficiency" challenges differ only negligibly where the failure of proof on an essential element of the offense is total. *See United States* v. *Dawlett*, 787 F.2d 771, 775 (1st Cir. 1986) (" 'It is the imperative duty of a court to see that all the elements of [a] crime are proved, or at least that testimony is offered which justifies a jury finding those elements.' In this instance the insufficiency of the evidence mandates reversal since plain error has been committed in an area so vital to the defendant. Surely our concept of justice is violated when a man is convicted of a crime he did not commit.") (citation omitted); *United States* v. *Spinner*, 152 F.3d

"linchpin" evidence be considered inconsequential, since the section 924(c)(1) conviction exposed Lorenzo-Hernández to a mandatory thirty-year prison term, *see supra* note 2, nearly trebling the eleven-year sentence imposed for his hostage-taking convictions under Counts 1 and 2. As the conviction under Count 5 constituted plain error, it may not stand.

c. The Hostage-taking Counts

The sufficiency challenge under the hostage-taking counts poses a more formidable hurdle for Lorenzo-Hernández. Although there was insufficient evidence that he toted a weapon, the record clearly reflects that the jury acted well within its prerogative in finding that Lorenzo-Hernández was not "merely present" at the hostage-scene, but knowingly participated in the related conspiracy.

Mieses-Pimentel was held hostage for three days at the third residence, where he remained blindfolded and

---

950, 956 (D.C. Cir. 1998) (finding plain error despite unpreserved sufficiency challenge, since "[i]t would be a manifest miscarriage of justice to let a conviction stand [where] the government failed to present any evidence on an essential element of the crime"); *Beckett* v. *United States*, 379 F.2d 863, 864 (9th Cir. 1967) (finding plain error despite defendant's waiver of sufficiency challenge where "there was no proof of one of the essential elements [of the charged offense]"); *accord United States* v. *Meadows*, 91 F.3d 851, 855 n. 6 (7th Cir. 1996) (noting, in dicta, that "a complete lack of any evidence of one of the essential elements of a crime is not only insufficient evidence, but too little evidence to avoid a manifest miscarriage of justice").

chained, which meant that two males had to bring his meals and respond to his "scream[s]" to use the bathroom.[9] Yet more importantly, Mieses-Pimentel testified that the *same* two males attended him throughout his captivity at the third residence. Furthermore, he not only identified Lorenzo-Hernández as one of the two males remaining at the third residence on the final morning, but gave no indication whatsoever that any other male resided continually in the third residence.

The circumstantial evidence thus strongly supported a reasonable inference that Lorenzo-Hernández was not only a long-term resident, but one of the two males residing in the house throughout Mieses-Pimentel's captivity, and that he participated in the hostage-taking, at the very least as the victim's guard and attendant. *See, e.g., United States* v. *Echeverri*, 982 F.2d 675, 678 (1st Cir. 1993) (rejecting "mere presence" defense, as criminal activity took place in defendant's residence, where he enjoyed "dominion and control"); *United States* v. *Lopez*, 944 F.2d 33, 39 (1st Cir. 1991) (same); *cf. United States* v. *Batista-Polanco*, 927 F.2d 14, 18 (1st Cir. 1991) ("[I]t runs counter to human experience to suppose that criminal conspirators would welcome innocent nonparticipants as witnesses to their crimes.").

---

[9] Mieses-Pimentel also testified that Lorenzo-Hernández gave him what the jury may have construed as an order. That is, when Lorenzo-Hernández and Mieses-Pimentel were left alone in the rear room after Raimary Lavandier and the second male fled the house, Lorenzo-Hernández told Mieses-Pimentel not to move around "in case the FBI came inside they would think he was looking for a gun and shoot us right there."

Therefore, in light of all the record evidence, the verdicts against Lorenzo-Hernández on Counts 1 and 2 must be affirmed, while the conviction under Count 5 must be vacated.

B. Failure to Employ Special Verdict Form for Count 5

Lorenzo-Pérez contends that the district court erred in failing to provide a special verdict form in relation to Count 5 – charging that he used and carried firearms (*viz.*, a 9 mm UZI, Ruger .367 revolver, and Smith & Wesson .357 revolver) during the kidnaping – which would have required the jury to indicate precisely *which* of the three weapons he used or carried.[10] The district court later sentenced Lorenzo-Pérez to a consecutive thirty-year prison term under Count 5, on the understanding that the jury must necessarily have been satisfied that he used or carried the UZI (*i.e.*, a "machinegun"), whereas his use of the two revolvers (*i.e.*, mere "firearm[s]") would have resulted in only a five-year prison-term enhancement. *See* 18 U.S.C. § 924(c)(1); *supra* note 2 (describing pertinent sentencing enhancements).

As it was never raised below, we review the present claim for plain error, employing the four-step inquiry prescribed in *Olano*. *See United States* v. *Hernandez-Albino*, 177 F.3d 33, 37-38 (1st Cir. 1999) (citing *United States* v. *Olano*, 507 U.S. 725, 732-33 (1993)):

---

[10] Although Lorenzo-Hernández raises the same claim in his brief, our vacatur of his conviction under Count 5 moots the claim, *see supra* Section II.A.2.b.

> First, an error must have been committed. Second, the error must be plain or obvious. Third, the plain error must "affect[ ] substantial rights," which generally means that it must have been prejudicial. Finally, because Rule 52(b) is discretionary, we must be convinced that the error " 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' "

Id. (citations omitted).

Lorenzo-Pérez predicates the present claim on *United States* v. *Melvin*, 27 F.3d 710 (1st Cir. 1994), where the defendants were jointly charged under section 924(c)(1) with using or carrying six weapons, some of which were "firearms," whereas others were "machineguns" implicating the thirty-year prison term. The defendants unsuccessfully sought a special verdict form which would have required the jury to specify which of the weapons the individual defendants used or carried. Instead, the district court instructed the jury that though the firearm count listed the six weapons conjunctively, rather than disjunctively, thereby apparently permitting the jury to convict only if it were to find that the defendants had used all six weapons, the jury should read the "and" as "or," and could convict each defendant if it were to find that each had used or carried "any one firearm" listed. *See id.* at 713-14. The jury returned a general verdict finding defendants guilty under Count 5.

At sentencing, the government urged the district court to impose the enhanced thirty-year prison term. Acknowledging that it could not divine from the general verdict form whether the jury had found that any defendant had used a "machinegun," the district court

declined. We affirmed. *See id.* at 715 "([T]he court's instruction explicitly permitted the jury . . . [to] suspend [ ] their deliberations on the use of firearms once they concluded that these experienced criminals must have carried at least a single gun. . . . "). Nonetheless, *Melvin* is unavailing to Lorenzo-Pérez, since the claim of error was duly preserved in *Melvin*, whereas the present claim must be reviewed for "plain error" in accordance with *Olano, supra.*

Furthermore, unlike the district court in *Melvin*, the district court below did not instruct the jury to read "and" as "or." Instead, the indictment in the present case emphatically phrased Count 5 in the *conjunctive* (*i.e.*, "using and carrying firearms, specifically, a 9 mm UZI, . . . a Ruger .367 revolver, . . . *and* a Smith & Wesson .357 revolver") (emphasis added). Accordingly, the district court correctly instructed the jury that there are two elements in subsection 924(c): (i) each defendant committed a crime of violence (*i.e.*, the hostage-taking), and (ii) "during and in relation to the commission of that crime, the defendant knowingly used or carried *a firearm.*" (Emphasis added.)

Lorenzo-Pérez nevertheless insists that the jury charge given below necessarily overrode the explicit conjunctive phrasing utilized in Count 5. We do not agree. Instead, the challenged instruction clearly informed the jury that it could not convict any defendant under Count 5 if it were to find that the defendant neither used nor carried *any weapon*. As the instruction accurately defined the applicable law, the present claim of error fails.

Lorenzo-Pérez suggests that other language in *Melvin* *mandates* special verdict forms in these cases; thus, the omission must be considered "obvious." On the contrary, *Melvin* simply rejected the government's contention that our decisions severely circumscribe recourse to special verdict forms in criminal cases. Moreover, we noted that the district courts are vested with *discretion* to employ special verdict forms in these cases – *i.e.*, where a section 924(c) count lists *both* a regular "firearm" and a "machinegun." *See Melvin*, 27 F.3d at 716 n. 10. The term "discretionary" rationally cannot be redefined as "mandatory." Thus, although *Melvin* vests district courts with the requisite discretion, Lorenzo-Pérez failed to request a special verdict form, thereby forfeiting any opportunity to satisfy the first two *Olano* criteria.

Furthermore, the evidence overwhelmingly demonstrated that Lorenzo-Pérez used or carried the UZI. For instance, Acosta-Molina testified that Lorenzo-Pérez threatened him with the UZI, calling it "The Silencer" for "people who talk." The UZI was recovered after Mieses-Pimentel had been rescued. Since the jury – even assuming it had been provided with a special verdict form – undoubtedly would have found that Lorenzo-Pérez used or carried the UZI during the Mieses-Pimentel hostage-taking, any possible error in failing to provide a special verdict form on Count 5 would not have " 'seriously affect[ed] the fairness, integrity or public reputation of [these] judicial proceedings.' " *Hernandez-Albino*, 177 F.3d at 38 (citations omitted); *see, e.g., United States* v. *Edgar*, 82 F.3d 489, 510 n. 15 (1st Cir. 1996) (finding no "plain error," in view of "strong evidence of guilt," even though an element of the crime was not made known to the jury).

Next, Lorenzo-Hernández raises the distinct, though related, claim that the district court erred in failing to define the term "machinegun," as used in subsection 924(c), so as to enable the jury to determine whether the UZI qualified. *Cf. supra* note 10. Following oral argument before this court, the United States Supreme Court held that the statutory sentencing enhancement for using or possessing a machinegun is an element of the offense, for determination by the jury, rather than simply a sentencing factor for determination by the district court. *Castillo* v. *United States*, ___U.S.___, 120 S. Ct. 2090, 2092 (2000). Although Lorenzo-Pérez has not raised this claim in his appellate brief, he did note *Castillo* in an informative motion.

We reject the resort to *Castillo* for several reasons, *see* Fed. R. App. Proc. 28(j), even assuming Lorenzo-Pérez may claim any benefit conferred by *Castillo*. *See United States* v. *Randazzo*, 80 F.3d 623, 631 (1st Cir. 1996) (generally, appellants entitled to apply law prevailing at time of appeal, rather than time of trial). Plain-error review applies to the present claim, even though the prevailing practice in the First Circuit at the time of the trial in the instant case was to treat the "machinegun" issue as a sentencing factor for resolution by the district court, rather than an element of the offense for jury determination. *See Johnson* v. *United States*, 520 U.S. 461, 467-68 (1997).

In all events, *Melvin* explicitly left open the distinct question now raised by Lorenzo-Pérez, as to whether "the 30-year sentence could not be imposed because the jury had not been asked to decide whether those firearms were, in fact, automatic weapons." *Melvin*, 27 F.3d at 715,

n. 9. Thus, it cannot seriously be contended that it *necessarily* would have been futile for Lorenzo-Pérez to assert the same claim at trial.

Moreover, even if we were to assume, *arguendo*, that the failure to instruct the jury on the meaning of the term "machinegun" overcame the first two *Olano* criteria, the *Castillo* claim advanced by Lorenzo-Pérez nevertheless falters on the fourth *Olano* criterion. Absent a "miscarriage of justice," criminal convictions are not reversed automatically even though the jury was never instructed on an essential element of the offense. *See Randazzo*, 80 F.3d at 631 (finding no "plain error," even though intervening Supreme Court decision determined that "materiality" is element of offense to be determined by jury, normally an omission constituting "structural error" necessitating reversal of conviction).

The government adduced uncontradicted evidence that Lorenzo-Pérez threatened Acosta-Molina with the UZI. Moreover, neither Lorenzo-Pérez nor Lorenzo-Hernández explains why an UZI, as a specie of firearm, does not readily meet the statutory definition of "machinegun." *Cf. infra* Section II.C (treating distinct argument that *this* UZI was inoperable; hence did not qualify as "machinegun"). For the foregoing reasons, Lorenzo-Pérez cannot demonstrate plain error.

C. Inoperable UZI as "Machinegun"

Lorenzo-Pérez claims that the UZI did not qualify as a "machinegun" under section 924(c), as a matter of law, since a weapons expert testified that it had been damaged

and/or clogged at some time in the past, and could not be fired until repaired. We disagree.[11]

While appellant cites no authority for the present proposition, numerous decisions hold otherwise. *See, e.g., United States* v. *Adams*, 137 F.3d 1298, 1299-1300 (11th Cir. 1998); *United States* v. *Hunter*, 101 F.3d 82, 85 (9th Cir. 1996); *United States* v. *Maddix*, 96 F.3d 311, 316 (8th Cir. 1996); *United States* v. *Yannott*, 42 F.3d 999, 1006 (6th Cir. 1994); *United States* v. *Willis*, 992 F.2d 489, 491 n. 2 (4th Cir. 1993); *United States* v. *Ruiz*, 986 F.2d 905, 910 (5th Cir. 1993); *United States* v. *Buggs*, 904 F.2d 1070, 1075 (7th Cir. 1990). Nor have we found a reported decision to the contrary.

Although we have yet to decide the issue, *but cf. United States* v. *Veilleux*, 40 F.3d 9, 11 n. 1 (1st Cir. 1994) (questioning, in dictum, ill-advised government concession that § 923(a) required proof that weapon was operable), we find the rationale adopted by our sister circuits plainly persuasive. Subsection 923(a)(23) broadly defines "machinegun" as "any weapon which shoots, *is designed to shoot, or can be readily restored to shoot,* automatically more than one shot, without manual reloading, by a single function of the trigger." 18 U.S.C. § 921(a)(23) (cross-referencing 26 U.S.C. § 5845(b)) (emphasis added). As the UZI in question plainly met the requirements of

---

[11] As it poses an issue of statutory interpretation, the present claim is reviewed *de novo*. *See United States* v. *Rostoff*, 164 F.3d 63, 66 (1st Cir. 1999).

subsection 921(a)(23), we affirm Lorenzo-Pérez's conviction and sentence under Count 5.[12]

D. Consecutive Sentences

Lorenzo-Pérez next contends that the district court committed reversible error in directing that the thirty-year prison term imposed under Count 5 run *consecutively* to the five-year term imposed under Count 3, *see supra* note 2, since both counts alleged subsection 924(c) violations arising from a single predicate offense, *i.e.*, the Mieses-Pimentel hostage-taking. As appellant failed to object at sentencing, we review for plain error. *See United States* v. *Torres-Rosa*, 209 F.3d 4, 8 (1st Cir. 2000).

The government acknowledges that there is no authority for imposing a consecutive thirty-year term. Moreover, though we have never addressed the issue, every circuit which has ruled to date agrees with the position urged by Lorenzo-Pérez. *See, e.g., United States* v. *Correa-Ventura*, 6 F.3d 1070, 1085 (5th Cir. 1993); *United*

---

[12] In a May 2, 2000, motion submitted prior to oral argument, Lorenzo-Pérez purported to notify the panel of other case authorities for a *distinct* proposition: that the government had adduced no evidence from which a jury might infer the requisite *mens rea, i.e.*, that he knew the UZI he possessed came within the definition set forth in § 921(a)(23). *See Staples* v. *United States*, 511 U.S. 600, 604 (1994). Even if *Staples* were legally and factually apposite, which it is not, *see United States* v. *Shea*, 150 F.3d 44, 51-52 (1st Cir.) (detailing reasons *Staples* rationale is inapplicable to § 924(c) offenses), *cert. denied*, 525 U.S. 1030 (1998), appellant failed to raise this distinct "*mens rea*" argument in his appellate brief. Therefore, it has been waived. *See United States* v. *Li*, 206 F.3d 56, 57 n. 1 (1st Cir. 2000).

States v. *Martinez*, 7 F.3d 146, 147-48 (9th Cir. 1993); *United States* v. *Sims*, 975 F.2d 1225, 1235-36 (6th Cir. 1992); *United States* v. *Freisinger*, 937 F.2d 383, 391-92 (8th Cir. 1991); *United States* v. *Luskin*, 926 F.2d 372, 376-77 (4th Cir. 1991); *United States* v. *Henning*, 906 F.2d 1392, 1399 (10th Cir. 1990).

Congress enacted subsection 924(c) principally as a *sentencing-enhancement mechanism* for application to persons convicted of underlying crimes of violence committed through the use of firearms. Nevertheless, the imposition of consecutive sentences under subsection 924(c) for using multiple weapons during a single crime of violence would impinge upon fundamental "double jeopardy" principles. *See id.*

Accordingly, we hold that the consecutive sentences imposed upon Lorenzo-Pérez for the two firearms convictions, involving but one hostage-taking, are to run concurrently.

E. The Severance Motions

Finally, all four appellants claim that it was error to deny their motions for severance, which were based on their contention that trial counsel for their co-defendant, Raimary Lavandier, unexpectedly interposed a totally antagonistic defense in mid-trial, thus essentially assuming the role of a "second prosecutor." Appellants identify two specific claims of prejudice: (1) that in opening and closing arguments, as well as in cross-examining Acosta-Molina, Lavandier's counsel focused upon and vouched for Acosta-Molina's testimony that Peña-Morfe, Lorenzo-Pérez, and Peña-Lora were the hostage-*takers* who

assaulted him violently, brandished various firearms, and repeatedly threatened his life and that of Mieses-Pimentel; and (2) that Lavandier's trial counsel ultimately utilized Acosta-Molina's testimony in forging a defense of duress, *i.e.*, that the violent behavior of these appellants intimidated her into committing the offenses charged.

Appellants argue that such an antagonistic defense constituted a *per se* ground for severance, since it was inevitable that the jury would convict them were it to credit the prejudicial allegations Lavandier made against her intimidators. *See, e.g., United States* v. *Buljubasic*, 808 F.2d 1260, 1264 (7th Cir. 1987) (noting that codefendant's coercion defense made severance "unavoidable").

We review severance rulings for any manifest abuse of discretion which deprived appellant of a fair trial and resulted in a miscarriage of justice. *See United States* v. *Magana*, 127 F.3d 1, 7 (1st Cir. 1997). As we have explained, however:

> "[P]ersons who are indicted together should be tried together[,] since [t]his practice helps both to prevent inconsistent verdicts and to conserve resources (judicial and prosecutorial). Thus, when multiple defendants are named in a single indictment, a defendant who seeks a separate trial can ordinarily succeed in obtaining one only by making a *strong showing of evident prejudice*. The hurdle is intentionally high. . . . "

United States v. *Flores-Rivera*, 56 F.3d 319, 325 (1st Cir. 1995) (emphasis added; citation omitted). Moreover, severance is especially disfavored in conspiracy cases. *See United States* v. *DiMarzo*, 80 F.3d 656, 659 (1st Cir. 1996).

In order to gain a severance based on antagonistic defenses, " 'the antagonism . . . must be such that if the jury believes one defense, it is *compelled* to convict the other defendant'." *United States* v. *Woods*, 210 F.3d 70, 79 (1st Cir. 2000) (emphasis added; citation omitted). Thus, for example, mere fingerpointing among codefendants – *i.e.*, the familiar "he did it, not I" defense – normally is not a sufficient ground for severance. *See, e.g., Zafiro* v. *United States*, 506 U.S. 534, 538-39 (1993) (declining to adopt "bright line rule" that conflicting defenses inevitably require severance); *United States* v. *McLaughlin*, 957 F.2d 12, 18 (1st Cir. 1992) ("The fact that two defendants assert antagonistic defenses does not, *per se*, require severance, even if defendants are hostile or attempt to cast blame on each other.").

The present record discloses nothing remotely approaching a manifest abuse of discretion by the district court. First, in her opening statement Raimary Lavandier's counsel expressly flagged, for all to hear, the substance of her anticipated defense,[13] yet appellants' counsel interposed no objection, let alone a motion to sever. *See Woods*, 210 F.3d at 78-79 (noting that defendant

---

[13] Lavandier's counsel argued, in pertinent part: "*If you believe the witnesses from the government* then you will hear some chilling evidence. . . . You are going to hear testimony about how scared the victim was, you are going to hear how scared and intimidated his family was, and you are even going to hear about how scared and intimidated other participants in this kidnaping were. You are going to hear how *the perpetrators of this crime* used guns, used other kinds of force, and used all kinds of means to instill fear, not only in the victim but also among the other people. . . . " (Emphasis added.)

waives right to belated severance if previously placed on notice of nature of codefendant's anticipated entrapment defense); *see also United States* v. *Gio*, 7 F.3d 1279, 1284-85 (7th Cir. 1993); Fed.R.Crim.P. 12(b)(5) (requiring that severance motions be presented prior to trial). When appellants finally moved for severance, government counsel noted that even the government had been "aware of the [Lavandier] defense . . . since before the trial," and expressed "astonish[ment] to find out [the codefendants] didn't know what [her] defense was going to be." Nor have appellants shown cause for their belated objections, which were not forthcoming until the Acosta-Molina cross-examination. *See* Fed.R.Crim.P. 12(f) (requiring defendant to show cause for failing to move for severance before trial); *United States* v. *Munoz*, 894 F.2d 292, 294 (8th Cir. 1990).

Second, even if the severance claim were preserved, the record refutes the principal complaint advanced by appellants: that Lavandier's counsel somehow elicited *additional* inculpatory evidence during the cross-examination of Acosta-Molina by exceeding the scope of direct examination. For example, appellants argue that Lavandier's counsel "extract[ed] [Acosta-Molina's] opinions and conclusions" concerning the purport of the nickname given the UZI – "The Silencer" – whereas on direct examination the prosecutor had merely elicited the nickname given the gun, "not what it was for." But in fact Acosta-Molina had already testified that Lorenzo-Pérez threatened him with the UZI, called it "The Silencer," and informed Acosta-Molina that it was "for the people who talk." The purport could not have been made much clearer.

Thus, the cross-examination by Lavandier's counsel, as the district court observed, was "basically a reaffirmation of the [government] witness's testimony [on direct]," neither adding to, nor subtracting from, the government's case. *See United States* v. *Arias-Villanueva*, 998 F.2d 1491, 1506-07 (9th Cir. 1993) (finding no abuse of discretion in denial of severance motion where evidence supporting defendant's duress defense would have been admissible against her codefendant at separate trial); *see also United States* v. *Rose*, 104 F.3d 1408, 1416 (1st Cir. 1997) ("[T]he level of antagonism in defenses is measured by the evidence actually introduced at trial; argument by counsel is not evidence.").[14]

Finally, the Lavandier defense was not irreconcilable with appellants' defenses. As the incompatibility of defenses is measured in degree, appellants must establish that any incompatibility was very substantial. "To obtain severance on the grounds of conflicting defenses, a defendant has to demonstrate that the defenses are so *irreconcilable* as to involve fundamental disagreement over *core and basic facts.*" *United States* v. *Paradis*, 802 F.2d 553, 561 (1st Cir. 1986) (emphasis added); *United States* v. *Luciano Pacheco*, 794 F.2d 7, 9 (1st Cir. 1986) ("[S]ince the need to believe one defendant over another will always occur in the face of antagonistic or fingerpointing defenses, this requisite credibility determination cannot be, and is not,

---

[14] We do not read the *Rose* case as holding that severance might never be warranted where defense counsel developed, through argumentation, a truly prejudicial antagonistic defense from the government's evidence alone. Each case must be assessed on its own facts.

the decisive factor. Rather, *the need for severance turns on the degree of conflict*, and the extent to which the antagonism goes beyond mere fingerpointing into the realm of fundamental disagreement over core and basic facts.") (emphasis added).

Foremost, appellants incorrectly intimate that a codefendant's defense of duress necessitates a severance in every instance. *See, e.g., United States* v. *Musquit*, 191 F.3d 928, 941 (8th Cir. 1999) (finding that defendant had not shown that "legally cognizable prejudice" resulted from his interposition of duress defense); *Arias-Villanueva*, 998 F.2d at 1507; *United States* v. *Villegas*, 899 F.2d 1324, 1346 (2d Cir. 1990) ("Nor is it sufficient [for severance] that one defendant contends that another coerced him to engage in the unlawful conduct if the jury could believe both that contention and the codefendant's defense [of nonparticipation]") (citation omitted); *United States* v. *Almeida-Biffi*, 825 F.2d 830, 833 (5th Cir. 1987) (finding that "jury's acceptance of [defendant's] duress defense did not require the jury to disbelieve her husband's defense [of nonparticipation]").

In the cases cited by appellants, the defendants had intended to testify that they knowingly participated in the offenses, but not until after their codefendants had coerced or intimidated them.[15] Were the jury to credit

---

[15] *See United States* v. *Serpoosh*, 919 F.2d 835, 838 (2d Cir. 1990) (reversing denial of severance motion where two defendants provided diametrically opposed versions of core events underlying drug transaction, each arguing in turn that the other had coerced or tricked him into participating); *United States* v. *Peveto*, 881 F.2d 844, 858 (10th Cir. 1989) (reversing

such a defense, it would be logically compelled to find that the codefendants themselves committed the crime which they coerced the defendant into joining.

By contrast, while cross-examining Acosta-Molina and during closing argument, defense counsel never conceded that Lavandier had participated in the hostage-taking, let alone that she had been coerced to do so by any appellant. Instead, she focused her argument on a single defense; namely, that Lavandier was "merely present" at the third residence ("[N]or did she participate in any significant way in this offense, other than being present and doing what she normally did . . . in that house.")

In recounting the *government's evidence* that the *hostage-takers* had intimidated Acosta-Molina, defense counsel did not suggest that the jury necessarily should believe Acosta-Molina's *identification* of appellants as the hostage-takers. Rather, in the main she suggested that Acosta-Molina's description of the hostage-takers' violent behavior (whatever their identity) was totally at odds

---

denial of severance where defenses were "mutually exclusive," in that jury could not have believed each defendant's assertion that he was "held against his will" at the scene of the crime if it had believed the codefendant's defense that he was becoming a government informant who "set up" drug dealers, and that he knew for a fact that the defendant had purchased drugs); *Buljubasic*, 808 F.2d at 1264 (noting that defendant first planned to testify that he unwittingly participated in offense by delivering money to codefendant, but decided to put on defense that he knew he was participating in a crime, but was intimidated into participation because of codefendant's reputation for carrying guns).

with Lavandier's passivity and benign presence at the scene of the crime ("[S]he didn't participate with these kinds of [violent] people."). Defense counsel likewise emphasized that Acosta-Molina had to muster all his courage in order to request that his cohorts remove Mieses-Pimentel from his house, and suggested that it was implausible that a small female in Lavandier's position could have withstood such violent hostage-takers when they relocated the victim to her residence. Finally, defense counsel noted that Lavandier, unlike the other hostage-takers, neither attended nor instructed Mieses-Pimentel. ("[She] never came into his room, [she] never held a gun to his head, [she] never engaged in any kind of intimidation that he was receiving from his captors.")

On the other hand, the primary defense advanced by appellants was that they never participated in the crime charged; *i.e.*, that Acosta-Molina falsely identified and implicated them in the hostage-taking. Thus, the "mere presence" defense advanced by Raimary Lavandier did not depend upon undermining the defenses presented by appellants. Lavandier neither testified, nor pointed to any evidence, for example, that Peña-Morfe, Lorenzo-Pérez or Peña-Lora threatened her. *Cf. supra* note 15. Instead, she argued that *regardless whether Acosta-Molina and the other government witnesses were telling the truth,*[16] the jury

---

[16] Appellants argue that Lavandier's counsel vouched for the government's evidence in her closing statement: "I submit to you that you ought to have total respect for what [Mieses-Pimentel] testified to." Appellants have wrenched the quoted statement from its context. Lavandier's counsel had just finished discussing Mieses-Pimentel's testimony concerning whether Lavandier had *ordered* him to be quiet, thus suggesting

should not convict her, since her conduct was inconsistent with the profile of these defendants. Accordingly, denial of the belated motions for severance did not constitute a manifest abuse of discretion.

The conviction and sentence of appellant Lorenzo-Hernández under Count 5 is hereby vacated, and the case is remanded for resentencing on the remaining counts. The imposition of consecutive terms of imprisonment upon appellant Lorenzo-Pérez under Counts 3 and 5 is hereby vacated, and the prison terms on these counts shall run concurrently. In all other respects, the district court judgment is affirmed.

SO ORDERED.

---

that Lavandier was one of the hostage-takers, or had simply *asked* him to be quiet. Counsel in no sense suggested that the jury credit any other part of Mieses-Pimentel's testimony as it pertained to Lavandier's codefendants.

UNITED STATES DISTRICT COURT
JUDICIAL District of PUERTO RICO

UNITED STATES OF AMERICA

Vs.

Tomás LORENZO-PEREZ
(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
3:97-CR0190-008 (SEC)

José SUAREZ SANTA
Defendant's Attorney

[SEAL]

THE DEFENDANT:

[ ] pleaded guilty to count _____

[X] was found guilty on counts 1, 2 3, and 5 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:1203 (a) (b)	Conspiracy re: hostage taking.	August 15, 1997	1 and 2
18:2 and 18:924 (c) (1)	Aid and abet in the use of a machine gun during the commission of a crime of violence.	August 25, 1997	3 and 5

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[ ] Count _____ is dismissed on the motion of the United States.

[X] It is ordered that the defendant shall pay a special assessment of $100.00, for counts 1, 2, 3, and 5, for a total of $400.00, which shall be due [X] immediately [ ] as follows

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 596-30-9425

Defendant's Date of Birth: December 29, 1956

U. S. Marshal No.: 16054-069

Defendant's Mailing Address:

Villa Nevarez

Rio Piedras, Puerto Rico

Defendant's Residence Address:

Same as above.

January 5, 1999
Date of Imposition of Sentence

/s/ Salvador E. Casellas
Signature of Judicial Officer

SALVADOR E. CASELLAS, USDJ
Name & Title of Judicial Officer

January 5, 1999
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of *one hundred and thirty five (135) months as to each of counts one and two, to be served concurrently with each other, as an imprisonment term of sixty (60) months as to count three, and of three hundred and sixty (360) months as to count five, said terms to be served consecutively to counts one and two, as required by law.*

[ ] The court makes the following recommendations to the Bureau of Prisons:.

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at _____ a.m. p.m. on _____.
[ ] as notified by the Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
[ ] before 2 p.m. on _____.

[ ] as notified by the United States Marshal.
[ ] as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of *five (5) years as to each of Counts One, Two and Five, and three (3) years as to Count Three, to be served concurrently with each other as required by law.*

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic tests thereafter, and whenever requested by the U.S. Probation Officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[X] The defendant shall not unlawfully possess controlled substances, and shall refrain from possessing firearms, as defined in 18 U.S.C. Section 921, or other dangerous weapons. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of payments set forth in the Criminal Monetary Penalties sheet of the is judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

[X] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 31
Criminal History Category: I
Imprisonment Range: 108 to 135 months

Supervised Release Range: 3 to 5 years as to Counts One, Two and Five, and 2 to 3 years as to Count Three.
Fine Range: $15,000.00 to $150,000.00

[X] Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Total Amount of Restitution: $_____

[ ] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims, pursuant to 18 USC Section 3663(d).

[ ] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payment.

[ ] Partial restitution is ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[X] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): Considering the seriousness of the offense committed, the expressed death threat and the psychological harm

done to the victim, and his family members, a sentence at the top of the applicable guideline imprisonment range is appropriate.

OR

[ ] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following specific reason(s):

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	**Crim. No.**
vs.	)	**97-190 (SEC)**
	)	
TOMAS LORENZO PEREZ,	)	
	)	
Defendant	)	
	)	

NOTICE OF APPEAL

(Filed Jan. 12, 1999)

TO THE HON. COURT:

Notice is hereby given that the above named defendant Tomás Lorenzo Pérez, hereby appeals to the United States Court of Appeals for the First Circuit from the Judgment entered on January 5, 1999.

I hereby certify that copy of the above notice has been sent to Rebecca Kellogg De Jesus, Assistant U. S. Attorney.

San Juan, Puerto Rico, this 11th day of January, 1999.

/s/ Rafael F. Castro Lang
RAFAEL F. CASTRO LANG
USDC-PR-128505
Attorney for defendant
P. O. Box 9023222
San Juan, P. R. 00902-3222
723-3672 – 723-1809
Fax 725-4133

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,	**SUPERCEDING INDICTMENT**
Plaintiff,	CRIMINAL NO. 97-190 (SEC) VIOLATION:
v.	Title 18, USC, Sections 2, 4, 924(c) (1), and 1203(a) (b)
[1] LORENZO PENÁ MORFE, [Counts One, Two, Three, and Five]	**(SIX COUNTS)**
[3] JORGE LORENZO HERNANDEZ, [Counts One, Two, and Five]	(Filed Apr. 1, 1998)
[4] CLECENCIO MARTINEZ CORREA, [Counts One and Two]	
[5] LUIS MANUEL PENÁ LORA, [Counts One, Two, and Four]	
[6] AMABLE NOLAZCO MORLA, [Counts One and Two]	
[7] RAIMARY LAVANDIER, [Counts One, Two, and six]	
[8] TOMAS LORENZO PEREZ, [Counts One, Two, Three, and Five]	
Defendants.	

THE GRAND JURY CHARGES:

COUNT ONE

From on or about August 15, 1997 until on or about August 25, 1997, in the District of Puerto Rico and within the jurisdiction of this Court,

[1] **LORENZO PENÁ MORFE,**

[3] **JORGE LORENZO HERNANDEZ,**

[4] **CLECENCIO MARTINEZ CORREA,**

[5] **LUIS MANUEL PENÁ LORA,**

[6] **AMABLE NOLAZCO MORLA,**

[7] **RAIMARY LAVANDIER,**

[8] **TOMAS LORENZO PEREZ,**

the defendants herein, being nationals of the Dominican Republic, did knowingly and intentionally combine, conspire, confederate, and agree together with various other persons, known and unknown to the Grand Jury, to seize, detain, and threaten to kill Richardson Leoncio Mieses Pimentel in order to compel other persons to pay money as a condition for his release, in violation of Title 18, *United States Code*, Section 1203(a)(b).

OBJECT OF THE CONSPIRACY

It was the object of the conspiracy that co-defendants and co-conspirators, along with others known and unknown to the Grand Jury, would take and hold Richardson Leoncio Mieses Pimentel hostage and threaten to kill him in order to compel other persons to pay money for his release.

OVERT ACTS

At the places and dates hereinafter mentioned, in furtherance of the execution of the conspiracy and for the purpose of carrying into effect the object of the conspiracy, the defendants named above, along with other individuals known and unknown, did perform, among others, the following overt acts within the jurisdiction of Puerto Rico:

1. On or about August 15, 1997, at approximately 10:35 p.m., LORENZO PENÁ MORFE, TOMAS LORENZO PEREZ, and John Doe, a. k. a. "Charlie", not charged herein, armed with firearms, forced Richardson Leoncio Mieses Pimentel into a car as he exited the Chris Cafe on Ponce de Le6n Avenue in Rio Piedras, Puerto Rico.

2. On or about August 15, 1997, SANTIAGO ACOSTA-MOLINA drove LORENZO PENÁ MORFE to a place where they met with TOMAS LORENZO PEREZ. CLECENCIO MARTINEZ CORREA arrived with TOMAS LORENZO PEREZ to that location. SANTIAGO ACOSTA-MOLINA, LORENZO PERA MORFE, and TOMAS LORENZO PEREZ then went to Parcel #21, where Richardson Leoncio Mieses Pimentel was being held by "Charlie".

3. On or about August 16, 1997, at approximately 8:15 a.m., a co-conspirator called the Chris Cafe and spoke to Victor Manuel Pimentel Ortiz, Richardson Leoncio Mieses Pimentel's uncle. The caller demanded $500,000 for the safe return of Richardson Leoncio Mieses Pimentel. The caller also instructed Victor Manuel Pimentel Ortiz to contact them when they were ready to

pay the $500,000 through Richardson Leoncio Mieses Pimentel's pager number, (787) 402-2337.

4. On or about August 16, 1997, a co-conspirator spoke to Marino Mieses, Richardson Leoncio Mieses Pimentel's older brother. When Marino told him that he had only $49,250, the co-conspirator responded that Richardson Leoncio Mieses Pimentel "is a good guy, too bad he has to die."

5. During the course of the conspiracy, SANTIAGO ACOSTA-MOLINA allowed his residence to be used for the purpose of holding Richardson Leoncio Mieses Pimentel hostage. LUIS MANUEL PENÁ LORA resided in an apartment above Santiago Acosta-Molina's residence and had access to the telephone in that residence.

6. Between August 15 and August 20, 1997, LUIS MANUEL PENÁ LORA and "Charlie" shared the responsibilities of guarding Richardson Leoncio Mieses Pimentel. During this time, they would maintain a handgun in close proximity.

7. During the course of the conspiracy, LORENZO PENÁ MORFE contacted AMABLE NOLAZCO MORLA to complain that the hostage's family had not paid the ransom request. AMABLE NOLAZCO MORLA then directed LORENZO PENÁ MORFE not to release the hostage because his family had the money.

8. On or about August 20, 1997, LUIS MANUEL PENÁ LORA transported Richardson Leoncio Mieses Pimentel to a residence in Barrio Obrero, where RAIMARY LAVANDIER, JORGE LORENZO HERNANDEZ,

(the son of TOMAS LORENZO PEREZ), and an unindicted minor resided.

9. From on or about August 20, 1997 through on or about August 25, 1997, RAIMARY LAVANDIER's husband, JORGE LORENZO HERNANDEZ, held Richardson Leoncio Mieses Pimentel hostage at the Barrio Obrero residence. While he held Richardson Leoncio Mieses Pimentel hostage, JORGE LORENZO HERNANDEZ directed the minor to provide Richardson Leoncio Mieses Pimentel with food and escort him to the bathroom. On one occasion, Richardson Leoncio Mieses Pimentel observed JORGE LORENZO HERNANDEZ holding a handgun.

10. At various times during the course of the conspiracy, TOMAS LORENZO PEREZ transported Richardson Leoncio Mieses Pimentel back and forth from the Barrio Obrero residence.

11. Count One, Two, Three, Four and Five herein are hereby re-alleged as overt acts in furtherance of the conspiracy as charged in this Count.

All in violation of Title 18, *United States Code*, Section 1203 (a) (b).

COUNT TWO

From on or about, August 15, 1997 until on or about August 25, 1997, in the District of Puerto Rico and within the jurisdiction of this Court,

[1] LORENZO PENÁ MORFE,

[3] JORGE LORENZO HERNANDEZ,

[4] CLECENCIO MARTINEZ CORREA,

[5] LUIS MANUEL PENÁ LORA,

[6] AMABLE NOLAZCO MORLA,

[7] RAIMARY LAVANDIER,

[8] TOMAS LORENZO PEREZ,

the defendants herein, being nationals of the Dominican Republic, while aiding and abetting each other, along with other persons known and unknown to the Grand Jury, did intentionally and unlawfully seize, detain, and threaten to kill Richardson Leoncio Mieses Pimentel in order to compel other persons to pay money as a condition for his release, in violation of Title 18, *United States Code*, Sections 2 and 1203(a)(b).

COUNT THREE

On or about August 15, 1997, in the District of Puerto Rico and within the jurisdiction of this Court,

[1] LORENZO PENÁ MORFE,

[8] TOMAS LORENZO PEREZ,

the defendants herein, while aiding and abetting each other, did knowingly, intentionally, and willfully use and carry firearms as that term is defined in Title 18, *United States Code*, Section 921 (a)(3), during and in relation to a crime of violence for which they may be prosecuted in a court of the United States, that is, taking a hostage, as prohibited by Title 18, *United States Code*, Section 1203(a). All in violation of Title 18, *United States Code*, Sections 924 (c) (1) and 2.

COUNT FOUR

From on or about August 15, 1997, through on or about August 20, 1997, in the District of Puerto Rico and within the jurisdiction of this Court,

[4] LUIS MANUEL PENÁ LORA,

the defendant herein, while aiding and abetted by John Doe, a.k.a. "Charlie", not charged herein, did knowingly, intentionally, and willfully use and carry a firearm as that term is defined in Title 18, *United States Code*, Section 921(a)(3), during and in relation to a crime of violence for which they may be prosecuted in a court of the United States, that is, taking a hostage, as prohibited by Title 18, *United States Code*, Section 1203 (a). All in violation of Title 18, *United States Code*, Sections 924(c)(1) and 2.

COUNT FIVE

On or about August 20, 1997 though August 25, 1997, in the District of Puerto Rico and within the jurisdiction of this Court,

[2] JORGE LORENZO HERNANDEZ,

and

[7] TOMAS LORENZO PEREZ,

the defendants herein, while aiding and abetting each other, did knowingly, intentionally, and willfully use and carry firearms as that term is defined in Title 18, *United States Code*, Section 921 (a)(3), specifically a fully-automatic 9 millimeter UZI, serial number UP00514, as defined in 18 U. S. C., Section 921 (a)(23) and 26 U.S.C., Section 845(b), a Ruger .357 revolver, serial number

153191995, and a Smith & Wesson .357 revolver, serial number 90922c-19, during and in relation to a crime of violence for which they may be prosecuted in a court of the United States, that is, taking a hostage, as prohibited by Title 18, *United States Code*, Section 1203(a). All in violation of Title 18, *United States Code*, Sections 924 (c) (1) and 2.

COUNT SIX

On or about August 20, 1997 though August 25, 1997, in the District of Puerto Rico and within the jurisdiction of this Court,

[7] **RAIMARY LAVANDIER,**

a defendant herein, having knowledge of the actual commission of a felony cognizable by a court of the United States, specifically Taking a Hostage, in violation of Title 18, United States Code, Section 1203 (a) (b), did intentionally and unlawfully conceal and fail to make the commission of that felony known as soon as possible to a judge or other person in civil or military authority under the United States, in violation of Title 18, *United States Code*, Section 4.

TRUE BILL

/s/ Monica M. [Illegible]
FOREPERSON

GUILLERMO GIL
United States Attorney

/s/ Jorge E. Vega-Pacheco
Jorge E. Vega-Pacheco
Assistant U.S. Attorney
Chief, Criminal Division

/s/ Timothy L. Faerber
Timothy L. Faerber
Assistant U.S. Attorney

Dated: April 1, 1998

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 99-1237

UNITED STATES,

Appellee,

v.

THOMAS LORENZO-PEREZ,

Defendant, Appellant.

JUDGMENT

Entered: September 1, 2000

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The imposition of consecutive terms of imprisonment upon appellant Lorenzo-Perez under Counts 3 and 5 is hereby vacated, and the prison terms on these counts shall run concurrently. In all other respects, the judgment of the district court is affirmed in accordance with the opinion issued this day.

BY THE COURT
PHOEBE MORSE
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 99-1237

UNITED STATES,

Appellee,

v.

TOMAS LORENZO PEREZ,

Defendant-Appellant.

BEFORE

TORRUELLA, Chief Judge,
CYR, Senior Circuit Judge,
SELYA, BOUDIN, STAHL, LYNCH and
LIPEZ Circuit Judges,

ORDER OF COURT

Entered: September 19, 2000

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Phoebe D. Morse, Clerk

By: JANICE M. O'NEIL
Chief Deputy Clerk

[cc: Mr. Lang and Ms. Morales]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,	)	
Plaintiff	)	
vs.	)	**Crim. No. 97-190 (SEC)**
TOMAS LORENZO PEREZ,	)	
Defendant	)	

[89] call your next witness.

MR. HOFFER: The United States calls Steven Caspar.

STEVEN CASPAR

having been called as a witness and duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HOFFER:

Q. Tell us your name?

A. Steve Caspar.

Q. Tell us where you are employed?

A. I am a Special Agent with the Federal Bureau of Investigation.

Q. Where are you currently assigned, sir?

A. To the FBI Laboratories, Firearms and Tool Marks Unit in Washington D.C.

Q. How long have you employed by the FBI?

A. For approximately 14 years.

Q. And how long have you been working for that particular division?

A. I have been in the firearms and tool marks unit for a little over five years.

Q. Sir, can you give us an idea of what your educational background is?

A. I have a Bachelors of Science degree in

* * *

[92] MR. HOFFER: Your Honor, at this time, I would make a motion to qualify this witness as an expert witness in the field of firearms identification?

Ms. RIOS: No objection.

THE COURT: Duly qualified and accepted by the Court as an expert.

BY MR. HOFFER:

Q. Sir, I would like to show you what is marked as Exhibits 35 and 35-A. Tell me what it is?

A. Exhibit 35 is the firearm that I worked on in the laboratory. This is a 9mm Uzi pistol.

Q. Sir, I would also like to show you what is marked as ID 40. Can you tell us what ID 40 is?

A. ID 40 is a copy of the laboratory report that I prepared with my conclusions of my examination.

Q. Is that a true and accurate photocopy, sir?

A. Yes, it is, it appears to have everything that my report had, yes.

Q. Once again, what is Exhibit 35?

A. Exhibit 35 is a 9mm Uzi pistol. Okay, it's manufactured by IMI, that is Israel Military Industries in Israel and it is imported by Action Arms from Philadelphia, Pennsylvania.

Q. Have you ever seen that weapon before?

A. Yes, I have and this weapon does bear my [93] laboratory markings, my symbols and my initials.

Q. Where are those, sir?

A. On the right hand side of the upper receiver.

Q. How did those get there?

A. I received those in the laboratory.

Q. How do those come to be in your possession?

A. It was received in the laboratory on December 11, 1997. It was sent by Federal Express from the San Juan Division by Special Agent Henry Sanin.

Q. What kind of bag was it in when it arrived?

A. This was in a sealed box.

Q. Sir, what did you do in relation to that firearm?

A. The request that I had for this firearm was to determine if this firearm functioned, if it functioned normally. So I conducted examinations in the laboratory to determine whether or not it functioned normally.

Q. What was the result of your examination?

A. Upon my examination of this firearm, I determined that it would not properly function in the manner that it was manufactured to function. The bolt and the firing pin assembly were very sticky. They were gummed up with possibly an old caked up lubricant. The upper receiver of the firearm was bent [94] inward. The gumminess of the material inside and the bent receiver did not allow the bolt to properly travel backward and forward in this function.

What I did was cleaned up the bolt and cleaned off the parts with WD 40 and then I took a punch and a hammer and pushed out the small indentation or the dent in the upper receiver. A that time I took the firearm to our range and I test fired it.

When I went to test fire this firearm it would not fire in the manner as it was functioned. This firearm is manufactured to fire in the semi-automatic mode. That means that you get one shot for every pull of the trigger. You have to pull the trigger and it fires and it only fires one shot. Then you let the trigger go forward and then you pull the trigger again and it fires again. It requires a separate pull of the trigger to fire.

It has two positions that this select a switch can be set on. The S position, which is for safety and the F position for fire. When I tried to test fire this firearm it

would only fire on the S position and it would only fire in the fully automatic mode, that is, when I pulled the trigger backwards it continued to fire cartridges one after another after [95] another very fast until I would let go of the trigger.

On the S position it would not fire. Then I noticed I could push it a little bit further forward and it would not fire in that position. So I took the firearm back to my station back in the laboratory and I took the firearm apart and I noticed an alteration was made on the internal parts of this firearm.

The selector lever that this switch is attached to had been altered, it had been shortened. Therefore, you were able to push this lever forward a little bit farther. And in the S position with that alteration done it would fire in the fully automatic load only.

So this firearm was altered to fire in the fully automatic mode and it would only fire fully automatic, that is, when I pulled the trigger it continued to fire cartridges as long as I had that trigger pulled.

Q. Sir, can you describe the difficulty or what would you have to do to make that alteration from the way that the weapon was originally manufactured until the condition that you found it in in December?

A. The alteration is quite simple. You get a special selector leveler and you make a bend in this lever in the inside part and you cut off a little bit [96] of the lever. It is very simple. All you need is a pair of wirecutters to snip off a portion of a switch inside that would allow the

firearm to function in a different manner and that would allow it to fire in the fully automatic load.

Q. You indicated to us that there was a dent in a part of the weapon?

A. Yes.

Q. Show the jury where the dent is?

A. The dent was on the left-hand side of the upper receiver. This is the lower receiver. It contains the trigger and the firing mechanism. This is the upper receiver of the firearm. It contains the bulk that slides back and forth in the barrel. The dent was in the top part of the upper receiver, top part of the frame. It is not a very heavy or beefy area of the frame. It is a thin metal. It was bent inward so that the bolt, the piece that moves back and forth could not move freely, so it was bent inwards. I easily punched that back out so that the frame was the way it was normally when it was manufactured and the bolt was able to work. I don't know how it got bent but I guess it could get bent from falling or dropping on that area.

MR. HOFFER: With the Court's permission, I [97] would ask the witness to remove the bolt and show the jury the exact area of the weapon, so that they can see the thickness of that particular metal.

THE COURT: Yes.

THE WITNESS: I am just removing the top of this frame. This area of the frame right here is the piece of metal that was bent inward right here. It is pushed out and I pushed it out. An area of the frame here is bent inward, so with the bolt backward it could go back freely.

The dent was right here and pushed inward. This part frame of the metal was dented inward and it would not allow the free travel of the bullets.

THE COURT: Show it to the defense counsel.

THE WITNESS: The dent was here on the top of the firearm and it was pushed inward and it would not allow the free flow of the bolt in and out, so I pushed it back out.

THE COURT: Thank you, sir. You may take your seat.

BY MR. HOFFER:

Q. Sir, I noticed that in Exhibit 35-A there is a magazine?

A. Yes, this would be a firearm magazine.

Q. Would that magazine fit in that particular

* * *

[108] A. Yes, I don't remember seeing a name on the firearm.

Q. You said that you don't recall seeing a name or initials on the firearm, is that what you are saying?

A. There may have been a tag on it, but I don't remember.

Q. Not in the actual firearm?

A. Oh, no.

Q. What was the appearance of the Uzi, was it rusted or was it kind of dirty?

A. I would say it was dirty. I don't think it was rusted. It didn't come – I did not receive it in a condition like it was purchased from the store, no.

Q. Could you say from your inspection that this weapon had not been used in quite some time?

A. I cannot determine that. There was a gun powder in the bore of that firearm so I can say that the firearm was most likely fired since it was last cleaned, it was used.

Q. But the modification that it had, you don't know when it was made?

A. When it was modified?

Q. Yes?

A. No, I don't know when it was modified.

* * *

[111] the latent firearm division and it was looked at and examined for fingerprints.

Q. But you don't know when?

A. I could give you the dates.

Q. What dates?

A. They are in my notes and I don't have them, I think Mr. Hoffer has them.

Q. You also said that the Uzi was gummed up, is that what you said?

A. Yes, sometimes if you have like a lubricant or grease that was sitting around for a long time it will get

almost hard and gummy. It appears that that might have been what was in the internal mechanism of the firearm.

MR. MONTES: Nothing Further.

THE COURT: Any other counsel?

MS. RIOS: No questions, your Honor.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. HOFFER:

Q. Sir, can you give us an idea of how long the long time might be?

A. Well, geez, months, years.

Q. It could be a matter of months?

A. Yes, it could be.

* * *